STATE OF MICHIGAN

COURT OF APPEALS

ANNA M. MILLER,

Plaintiff-Appellee,

v

EDWARD A. MILLER,

Defendant-Appellant..

UNPUBLISHED
September 18, 2001

No. 224147
Washtenaw Circuit Court
LC No. 91-042934-DM

Before: Neff, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right a judgment of divorce. We affirm.

Review of this case has been a complicated task. As noted by defendant in his brief on appeal:

> This case has been a long and complex undertaking. There have been four judges involved with a variety of court reporters who have come, gone and retired. Appellee-Plaintiff has had three attorneys and Appellant-Defendant has had four. The Court docket is incorrect and the records are incomplete with various materials missing or incomplete. The record defies review.

This Court's review of the issues raised by defendant is limited to the record available for review.

The parties were married in 1978. At that time, plaintiff was twenty-six years of age and had a bachelor's degree in English and a teaching certificate. Defendant was thirty-five years of age and had a bachelor's degree in mechanical engineering. The parties had five children, and upon the birth of the first child in January 1979 plaintiff did not return to teaching. In 1987, defendant began employment with the National Center for Manufacturing Sciences (NCMS) as President, earning a base salary of $170,000.

On April 23, 1991, plaintiff filed a complaint for divorce in Washtenaw Circuit Court. The case was assigned to Judge Ross Campbell. A stipulation and order setting combined child and spousal support at $1,085 per week, effective May 1, 1991, was entered on May 9, 1991. From May through September 1992, referee Craig Ross conducted Friend of the Court (FOC) negotiations. On September 18, 1992, the parties placed a settlement agreement on the record,

reserving the issues of attorney fees, child support, and alimony pending evidentiary hearings on these issues. Several evidentiary hearings were held in March and April of 1993.

In August 1995, defendant resigned from his employment with NCMS with a one-year severance package. Defendant received $250,00 up front, less the amount owed on a loan from NCMS, and a year's salary of $250,000 to be divided over twelve months. On October 12, 1995, the court issued an opinion ordering unallocated support in the amount of $70,000 from October 2, 1992, through October 2, 1994, and $60,000 per year from October 2, 1994, through October 1, 1995, and reserved support thereafter pending a hearing on defendant's motion to reduce support. The issue of support was referred to the FOC referee, who conducted a hearing and issued a report on February 23, 1996. Defendant filed objections to the recommendation and evidentiary hearings were held regarding support on May 24, 1996, and July 17, 1996.

At these evidentiary hearings, plaintiff testified that she was substitute teaching for $60 per day. She indicated that defendant had paid $1,085 per week until August 1995, but was currently $40,000 in arrears. She indicated that her expenses were more than her income, and that the children were receiving free lunch and breakfast at school and were on Medicaid.

Defendant testified that he had no significant assets remaining except for his retirement (TIAA-CREF). The house that he was awarded in the September 1992 settlement was sold to his live-in female companion to whom he alleged he owed money and, therefore, he received no money from the sale of the home. This companion also purchased one of the parties' houses in New Hampshire at an auction. Defendant indicated that he received income of $170,000 in 1993, $456,000 in 1994, and $183,916 in 1995. He indicated that his income as of May 1996 was approximately $50,000. He testified that he traveled extensively with the children and that he spent hundreds of thousands of dollars in legal fees. He admitted that he did not purchase health insurance for the children.

Following the hearings, the trial court issued an opinion on October 30, 1996. The court made the following findings of fact:

> 1. Defendant's income between October 2, 1992, and August 31, 1992, totaled $851,000.
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> 2. Defendant' support obligation was set based on a projection that defendant would earn income of approximately $170,000/year.
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> 3. The court's projection of earnings for the defendant was $341,500 less than what defendant actually earned.
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> 4. Defendant did not report his actual income to the Friend of the Court or to this court, but instead allowed plaintiff to receive an amount of support less than what she would have been entitled to.
>
> 5. Defendant's testimony that he spent all of the income he has earned since 1992, and that most of it was spent on things for the children, is not credible. The evidence submitted by the defendant establishes only $48,059.19 in expenditures purportedly on behalf of the children since April 1994.

6. Defendant's testimony that he only earns $50,000/year is not credible given the numerous networking opportunities he has described in his testimony, and given the amount of business travel and/or pleasure travel (accompanied by some of the minor children) described by the evidence.

7. Defendant is able to pay support at the amounts previously ordered by the court.

The court then made the following conclusions of law:

1. Defendant has secreted past and present income to avoid paying an equitable amount of the unallocated family support ordered by this court.

2. Equity requires a remedy for defendant's bad faith failure to report his actual income.

3. Unallocated family support should continue to be paid by defendant to plaintiff at the present amount through August 31, 1999, and defendant's motion to reduce support should be denied.

4. Arrearages accumulating since September 1, 1995, based on the continuing order of unallocated support dated October 12, 1995, should not be reduced but should be paid in full.

5. Since the judgment of divorce has not yet entered, as a matter of equity this court should revise its award of property between the parties to award plaintiff the entirely of defendant's TIAA-CREF account. Such an award is appropriate to protect plaintiff against future non-payment of support by the defendant, to secure payment of support arrearages which have accumulated to date, and to sanction the defendant's conduct in secreting income properly payable to the plaintiff as support for the plaintiff herself and for the minor children as well. Since the court does not have evidence of the current value of the TIAA-CREF account (plaintiff's Exhibit 6 places the June 30, 1996, value at $292,491.57), the court orders the defendant to obtain a current valuation of the account and present this information to the court within 30 days of the signing of this opinion.

6. Defendant should be responsible for all family counseling expenses incurred, since his level of income, particularly compared to that of the plaintiff, will support such a financial commitment.

7. Defendant should pay all of plaintiff's attorney fees incurred since August 31, 1994, since defendant received his buy out from NCMS in August 1994, he had the ability to pay even higher unallocated support from that time forward, and his failure to pay an appropriate amount of support from that time forward necessitated the attorney fees incurred by the plaintiff.

The court ordered plaintiff

> . . . to prepare a Judgment of Divorce consistent with these and other previously ordered provisions, leaving blank for entry by the court the value of the TIAA-CREF account to the plaintiff and defendant. Unallocated family support shall continue at the present amount through August 31, 1999. Future support, whether unallocated family support, a combination of spousal support and child support, or child support alone, is reserved. . . .

Plaintiff scheduled a hearing to enter a proposed judgment of divorce for December 5, 1996. The court granted defendant's request for an adjournment for one week. The court ordered that a judgment of divorce would be entered on December 12, 1996, with or without argument, depending on whether defendant submitted written objections. Defendant submitted untimely written objections but did not appear for the hearing. The court considered defendant's objection and entered the judgment on December 12, 1996. The court noted that the judgment was "based in part upon the above referenced Settlement Agreement of the parties; this Court's opinion and order dated October 12, 1995; and this Court's Findings of Fact and Conclusion of Law and Order dated October 30, 1996." Because defendant had filed a motion to change custody, the issues of custody and visitation were reserved in the judgment of divorce.

In January 1999, a trial was held on the issues of custody, support, parenting time, and arrearage. An opinion and order was entered on June 9, 1999.

I

Defendant first contends that the parties never sought to set aside the September 18, 1992, settlement agreement and, therefore, the trial court erred by failing to incorporate the agreement into the December 12, 1996, judgment of divorce. Defendant has not explained the manner in which the trial court's judgment differs from the settlement agreement, other than to state that the court "ignored the issue of custody and parenting time" and failed to give the parties an opportunity to be heard.

A review of the record reveals that the parties had settled the issues of custody and parenting time in a settlement agreement in September 1992, but defendant continued to contest custody throughout the lengthy duration of this case. Defendant was given notice that a judgment of divorce would enter on December 12, 1996, with or without argument, depending on whether defendant filed written objections. By the time the judgment of divorce was entered, defendant had filed a motion to change custody. Therefore, the court reserved in the judgment a ruling on the issue of custody and visitation pending an investigation by the Friend of the Court and a hearing on the issues. Given these facts, we reject defendant's argument that he was not afforded due process regarding notice of the entry of the judgment of divorce.

II

Defendant argues that the trial court's reservation of a ruling on the issue of custody and parenting time amounted to a bifurcation that is impermissible under *Yeo v Yeo*, 214 Mich App 598; 543 NW2d 62 (1995). In *Yeo*, the Court noted that MCR 3.211(B) provides that a judgment of divorce must include a determination of the property rights of the parties and, therefore, reservation of the issue of property division is not permitted. *Yeo* did not involve reservation of

the issues of custody, support, and visitation. Indeed, nothing in MCR 3.211(B) provides that a judgment of divorce must include a determination of custody, support, or visitation.

Because the only issue remaining at the time of trial involved defendant's motion to change custody, the trial court did not abuse its discretion when it entered a judgment of divorce with a reservation of the issues of custody and visitation to allow the FOC to conduct an investigation and to allow defendant the opportunity to be heard regarding this issue.

III

Defendant asserts that the trial court abused its discretion by assigning defendant's share of his TIAA-CREF retirement account to plaintiff. In the settlement agreement that was placed on the record, each party was apparently awarded 50% of the value of defendant's TIAA-CREF account as marital property. The court cannot modify property divisions reached by the consent of the parties, and finalized in writing or on the record. *Quade v Quade*, 238 Mich App 222, 226; 604 NW2d 778 (1999); *Bers v Bers*, 161 Mich App 457, 463-464; 411 NW2d 732 (1987). The court is bound to uphold such settlements and cannot set them aside absent fraud, duress, mutual mistake or severe stress. *Quade*, *supra*; *Keyser v Keyser*, 182 Mich App 268, 269-270; 451 NW2d 587 (1990).

In a March 25, 1996, "Answer to Defendant's Motion for Entry of Judgment of Divorce and Qualified Domestic Relations Order," plaintiff alleged that defendant had accumulated a large support arrearage and was claiming an inability to pay the support ordered despite his high income. Therefore, plaintiff requested that "the court consider awarding her as much of defendant's retirement assets as is necessary to provide her any such future support, as well as pay her for the past arrearage resulting from this court's opinion in October 1995." The court, finding that a judgment of divorce had not yet entered, altered the property settlement in light of the fact that defendant secreted his actual income, was not paying support as ordered, and was disposing of his assets. The trial court awarded plaintiff defendant's 50% share of the TIAA-CREF account as a way of paying past arrearages and as the "one remaining way of securing future support for plaintiff and the children" in light of defendant's testimony that he had no assets and had spent all of his income.[1] The court's opinion clearly reflects a finding that defendant had committed fraud by failing to reveal his actual income, and this appears to be the primary reason for the court's modification of the settlement agreement. We find that the eventual result sought and achieved by the trial court is equitable in the instant case given defendant's failure to reveal his actual income, the accumulated arrearage, and plaintiff's inability to adequately provide support for herself and the children

Defendant's arguments regarding the award of attorney fees to plaintiff and the division of the marital assets are not presented in the statement of questions presented. The appellant must identify his issues in his brief in the statement of questions presented. MCR 7.212(C)(5), *Grand Rapids Employees Independent Union v Grand Rapids*, 235 Mich App 398, 409-410; 597 NW2d 284 (1999). No point will be considered which is not set forth in the statement of questions presented. *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000).

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[1] In the settlement agreement, defendant was given 50% of the TIAA-CREF account.

IV

Although not absolutely clear, it appears that defendant is arguing that, because defendant resigned from his employment in August 1995, the trial court abused its discretion by continuing the award of unallocated support at $60,000 per year in the December 12, 1996, judgment of divorce. However, a review of the record reveals that a June 9, 1999, order retroactively modified the amount of family support ordered in the December 12, 1996, judgment, effective October 31, 1996.[2] Because the judgment of divorce was modified in the final order that is the subject of this appeal, the support provision in the judgment of divorce is no longer applicable. Further, this Court has no way of knowing what has transpired below with regard to the issue of support following the FOC investigations ordered in the June 9, 1999, order. Accordingly, we decline to review the support provisions of the December 12, 1996, judgment of divorce.

V

Defendant contends that the trial court erred by including a personal protection order in the judgment of divorce without giving defendant notice and an opportunity to be heard. He states that "it is the recollection of Appellant-Defendant that this restraining order was placed in effect while his counsel was on vacation and between law firms having been entered under the 7 day rule, MCR 2.602(B)(3), without again being given the opportunity to object." Thus, he asserts that the personal protection order was improperly included because the trial court failed to comply with MCR 3.310(b), which provides that:

> (1) A temporary restraining order may be granted without written or oral notice to the adverse party or the adverse party's attorney only if:
>
> (a) it clearly appears from specific facts shown by affidavit or by a verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant from the delay required to effect notice or from the risk that notice will itself precipitate adverse action before an order can be issued;
>
> (b) the applicant's attorney certifies to the court in writing the efforts, if any, that have been made to give the notice and the reasons supporting the claim that notice should not be required; and
>
> (c) a permanent record or memorandum is made of any nonwritten evidence, argument, or other representations made in support of the application.

Defendant's reliance on MCR 3.310 is misplaced, as the court included a personal protection order in the judgment of divorce, not a temporary restraining order. What can be gleaned from the record available is that defendant was convicted of criminally assaulting plaintiff in 1992, during the pendency of the divorce proceedings. Given the contentious nature of this divorce litigation, the court apparently felt it necessary to include the personal protection order in the judgment of divorce. The judgment provides that:

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[2] October 31, 1996, is apparently the date that defendant moved to reduce support.

> Both civil and criminal Domestic Assault Restraining Orders, in effect during the pendency of the divorce proceedings, shall continue in effect in the form of a personal protection order for five (5) years from the date of entry of this Judgment. Plaintiff shall submit a PPO for entry by the court within 14 days of the date of entry of this order.

There is no procedural due process defect in obtaining an emergency order of protection without notice to a respondent when the petition for the emergency protection order is supported by affidavits that demonstrate exigent circumstances justifying entry of an emergency order without prior notice, see, e.g., *Mitchell v W T Grant*, 416 US 600; 94 S Ct. 1895; 40 L Ed 2d 406 (1974), and where there are appropriate provisions for notice and an opportunity to be heard after the order is issued. See *id.; Gargagliano v Secretary of State*, 62 Mich App 1, 11; 233 NW2d 159 (1975). MCL 600.2950(12) permits a court to issue an ex parte order only if

> it clearly appears from specific facts shown by verified complaint, written motion, or affidavit that immediate and irreparable injury, loss, or damage will result from the delay required to effectuate notice or that the notice will itself precipitate adverse action before a personal protection order can be issued.

In this case, a temporary restraining order had been in place throughout the pendency of the divorce. Thus, plaintiff had already made the necessary showing to support issuance of a personal protection order, and the trial court, which was involved with this case and the parties for several years, was intimately aware of the situation involving these parties.

Further, MCL. 600.2950(13) gives a respondent the right to bring a motion to rescind a personal protection order within fourteen days of being served with notice or receiving actual notice of the personal protection order, and MCL 600.2950(14) requires the court to schedule a hearing on the motion within five or fourteen days. Clearly, the procedural safeguards employed under the statute are sufficient to meet a due process challenge. *Kampf v Kampf*, 237 Mich App 377, 384; 603 NW2d 295 (1999).

VI

Last, defendant maintains that the trial court failed to provide him with notice of the date set for trial and thereby denied him the opportunity to present his objections on the issues of child support, alimony, and attorney fees. However, a review of the record reveals that evidentiary hearings were held on May 24, 1996, and July 17, 1996, at which time the court took testimony from both parties. On October 30, 1996, an order was entered that contained findings of fact and conclusions of law and that provided that:

> Plaintiff shall prepare a Judgment of Divorce consistent with these and other previously ordered provisions, leaving blank for entry by the Court the value of the award of the TIAA-CREF account to the Plaintiff and Defendant. Unallocated family support shall continue at the present amount through August 31, 1999. Future support, whether unallocated family support, a combination of spousal support and child support, or child support alone, is reserved. . . .

On December 5, 1996, plaintiff provided notice to defendant that the judgment of divorce would be entered on December 12, 1996, at 2:30 p.m. "unless specific written objections are filed with the court and served personally or by facsimile on Plaintiff's attorney by December 11, 1996. If specific written objections to the Judgment of Divorce and Qualified Domestic Relations Order are not filed and so served by December 11, 1996, then the Court without argument shall enter such Judgment and Order. If written specific objections are so filed and served, then the Court will hear oral argument on such specific written objections."

Defendant admitted below that specific written objections to the Judgment of Divorce were not filed with the court until December 12, 1996. The record simply does not support defendant's contention that he was not given notice or an opportunity to object to entry of the judgment of divorce. Further, as noted above, the record reflects that a hearing on the issues of child support and alimony was held, resulting in an order modifying the December 12, 1996, judgment. Hence, we reject defendant's argument.

Affirmed.

/s/ Janet T. Neff
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald